APPEAL NO. 92103
MAY 1, 1992

This appeal arises under the provisions of the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act) and is taken by carrier from the decision and order entered by (hearing officer) who presided over the contested case hearing held in (city), Texas, on January 21, 1992. Carrier challenges the sufficiency of the evidence to support the hearing officer's decision that claimant's injury, sustained when a fellow employee beat him on the head with a hammer, occurred within the course and scope of claimant's employment. Carrier asserts that the evidence showed that carrier was not liable for compensation under either of two exceptions found in the 1989 Act, to wit: Article 8308-3.02(2) concerning an injury "caused by the employee's willful intention and attempt to injure himself or to unlawfully injure another person," and, Article 8308-3.02(4) concerning an injury arising from "an act of a third person intended to injure the employee because of personal reasons and not directed at the employee as an employee or because of the employment." Claimant contended that the attack on him was not caused by his unlawful attempt to injure the coworker, that it did arise from work-related circumstances and was directed at him as an employee and not for personal reasons.

DECISION

The evidence being factually sufficient to support the findings of fact, conclusions of law, and decision of the hearing officer, we affirm.

The parties stipulated that claimant had an injury on the job on (date of injury), and agreed that the issues before the hearing officer were whether carrier was spared from payment of compensation to claimant under the exceptions provided in Articles 8308-3.02(2) and (4)(1989 Act).

Claimant was the only witness called on his behalf. He testified that he had been employed for about three weeks by (Employer) loading lumber for customers when, on May 8, 1991, at around lunch time, coworker PD came to the area where claimant was working and took another employee who had been helping claimant away "to run a truck load." Claimant did not see PD the rest of that day. On (date of injury), claimant worked during the morning, clocked out for lunch, ate his lunch, then returned to Employer's premises and entered the break room at about 12:30 p.m. to get a soft drink before clocking back in and commencing his afternoon's work. Claimant did not have to begin work again until 1:00 p.m. but could clock in early if he elected to do so. The break room contained a water fountain, soft drink and candy machines, and a desk and chairs with a telephone on the desk. When claimant entered the break room, fellow employees KP, D, and PD were already in the room and PD was seated behind the desk talking on the telephone. Claimant obtained a soft drink from the machine and sat down on a chair beside the desk. When PD concluded his telephone conversation, he asked claimant why claimant had called him a "bitch" the previous day. Claimant denied having done so. Apparently, PD was angry and repeatedly insisted claimant had used that term while claimant tried to calm PD down and

repeatedly denied having done so. PD then made another telephone call during which time claimant spoke with KP who was also seated in the room. When PD concluded the second telephone call, he arose from his chair behind the desk and began to walk slowly around the side of the desk opposite from the side where claimant was seated and in the direction of the door to the break room. According to claimant, PD suddenly picked up an object from the desk and struck claimant on the top of his head without any provocation or warning. The object PD used was a hammer. Claimant hadn't realized PD was going to do anything until he received the first blow from the flat side of the hammer. Claimant pushed PD back onto the desk and got on top of him to restrain him while PD kept hitting claimant with the hammer on the back and possibly landing more blows to claimant's head.

Claimant said he was momentarily stunned and was blinded by blood on his face. Claimant wrestled around with PD and finally got the hammer away from him. PD then ran out the door. KP and D had also departed.

Claimant said he knew PD only from work, had no knowledge of or relationship with PD aside from the workplace, had had no prior confrontations with PD, and knew of no basis for PD having any personal grudge against claimant. Claimant believed that the incident was related to his employment and apparently had something to do with who was supposed to be working with whom on May 8th. He was referring to PD having taken his helper the previous day. He opined that the reason for the attack was PD's believing that claimant had called or referred to him as a "bitch" the previous day. Claimant denied provoking or starting the fight and said he didn't even stand up until he received the first blow.

KP, the only other witness called, testified for carrier. He said he no longer worked for Employer and had been a friend of PD since high school. He knew that PD had been in other fights. According to KP, PD was the first to speak after claimant had entered the room. KP didn't know what the problem was between the two at the time and didn't find out until later. KP didn't hear all the conversation between claimant and PD but did hear claimant say to PD, in effect, that if he had anything to say to PD he would say it to PD's face. KP thought PD was going to leave the break room when he arose and began walking around the side of the desk. No one spoke at that time. However, claimant suddenly jumped up, though not assuming a fighting stance, and said to PD, "[d]o you want to fight," whereupon PD turned, grabbed the hammer which had been lying on the desk, walked five or six feet around the front of the desk and hit claimant on the top of the head. Claimant and PD then wrestled around the room. This action happened very quickly. KP assumed that when claimant jumped up it was an act of aggression. KP believed that claimant started the fight. KP was not aware of any personal animosity between claimant and PD and, so far as he knew, their only relationship was at the workplace.

In argument, carrier contended that while PD had commenced the verbal confrontation with claimant, PD concluded such confrontation and began to leave the room when claimant then commenced the physical confrontation and thus removed the incident from the course and scope of his employment. Carrier contended that PD was provoked

by claimant when claimant stood up suddenly and inquired about wanting to fight; and, that PD was then presented, essentially, with the choice of either going forward with the attack, as he did, or slinking away in cowardice. Carrier also argued that the fight arose from a personal animosity rather than from claimant's employment, although the nature or source of such animosity was not articulated. Carrier further urged that claimant was still on his lunch break and not actually performing work for Employer at the time he was injured.

In Texas Workers' Compensation Commission Appeal No. 91070, decided December 19, 1991, Panel No. 1 noted that the exceptions to compensability found in Articles 8308-3.02(2) and (4) were substantially similar to provisions of the predecessor statute and would be viewed as conveying the same meaning. Panel No. 1 went on to cite authority to the effect that when a carrier presents sufficient evidence to raise an issue as to these exceptions, the employee has the burden to prove that the exceptions do not apply. In Appeal No. 91070, Panel No. 1 found that the testimony of an employee raised issues as to the same exceptions as are involved in this case and that the injured employee failed to meet his burden of proof in showing that the assault upon him was not for personal reasons and that his injury was not caused by his willful intent to unlawfully injure the other employee. That case also involved the use of an opprobrious appellation.

Carrier asserts in its Request for Review that claimant "changed this from a verbal altercation to a physical altercation . . . [when claimant] stood up, doubled his fist, and challenged [PD] to fight. . . ." Such conduct by claimant removed him from the course of employment, argues carrier, and raised the exception under Article 8308-3.02(2). Claimant's injury, which was stipulated, clearly did not result from claimant's willful intention and attempt to injure himself. We believe that, just as clearly, claimant's injury did not result from an attempt to unlawfully injure PD. Claimant testified he was still seated when he was struck with the first hammer blow. KP, the only other source of evidence at the hearing, testified that claimant had suddenly jumped up but did not assume a fighting stance. KP said that when claimant then asked PD if he wanted to fight, PD came around the desk, picked up the hammer, and struck claimant in the head. KP said that PD may have already started to swing the hammer when claimant said those words and that it all happened very fast. It was up to the hearing officer to determine which version to accept since he was charged with being the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). Under either scenario, however, claimant did not "attempt to injure" PD and thus claimant's injury was not caused by his willful intention and attempt to injure PD. There was a dearth of evidence to even raise the exception in Article 8308-3.02(2). Even if claimant's conduct in jumping up and asking PD if he wanted to fight could be viewed as an "attempt to injure," the hearing officer's findings that PD and not claimant initiated the fight, that claimant did not initiate the attack by challenging PD to fight, and that claimant reacted in self-defense were supported by the evidence. *Compare* Appeal No. 91070, *supra*, wherein we observed that this exception is only infrequently found in the case law and generally turns on the source of the aggression.

Turning to the personal animosity exception provided for in Article 8308-3.02(4), we

are again hard-pressed to find evidence sufficient to even raise this exception and leave claimant with the burden of overcoming it. Neither the assailant employee nor the other witness, D, were called to testify nor were statements from them offered. KP testified that he was not aware of any personal animosity between claimant and PD and that their only relationship was at the workplace. The hearing officer found that claimant did not know PD "outside work" [and] "had no contact with [PD] other than at work." He also found that the altercation arose from claimant's employment and not for personal reasons between claimant and PD. Because KP was unaware of and could not testify to the incident of the previous day involving PD's taking claimant's helper away, and because the hearing officer could have viewed the evidence as showing the altercation in the break room erupting spontaneously without any apparent relationship to the employment or to claimant's status as an employee, we will review pertinent authorities and the sufficiency of the evidence to support the hearing officer's findings regarding this exception.

Panel No. 4 had occasion to review the construction of this exception by the Texas courts and observed as follows in Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992:

> [t]he mere fact that an employee is injured by a fellow employee while both are at work does not *ipso facto* give rise to a compensable injury. (Citations omitted). Once probative evidence gave rise to the so-called intentional injury exception, claimant had the burden of showing by a preponderance of the evidence that [coworker's] obviously intentional act of pushing her was directed at her as an employee or because of her employment. (Citation omitted). `The controlling point is whether there was a causal connection between the assault and the employment of the claimant.' (Citation omitted) . . . . To avoid the exception, the quarrel must relate to the employment and not arise from personal reasons not in furtherance of the employee's duties. (Citation omitted).

In Williams v. Trinity Universal Insurance Company, 309 S.W.2d 850, 852 (Tex. Civ. App.-Amarillo 1958, no writ), one employee struck another employee who then picked up a board to defend himself. The assailant then grabbed the victim around the neck causing injury. The injured employee could not testify to any apparent reason for his being initially struck and the court thus concluded that the injury was not compensable. The court first recognized the Texas rule that "compensation is recoverable where the injury received by an employee resulted from horseplay engaged in by fellow employees in which the claimant took no part." The court then reasoned that if, on the one hand, the striking of the injured employee amounted to horseplay, the victim participated in such horseplay by seizing the board to protect himself. On the other hand, if the blows were struck by the assailant employee for no apparent reason whatsoever, then they were not directed against the injured employee as an employee or because of his employment. The court stated the assaultive injuries rule thusly:

In the case of injuries inflicted by assault, the rule is that if one employee assaults another solely from anger, hatred, revenge or vindictiveness, not growing out of or as an incident to the employment, the injury is to be attributed to the voluntary act of the assailant, and not as an incident of the employment. But if the assault be incidental to some duty of the employment, the injuries suffered thereby may properly be said to rise out of the employment. The statement of the rule, as thus determined by authorities, is simple enough. Its application is sometimes fraught with puzzling effect. The vital question seems to be: was the accident connected with the employment? If it was, then it arose out of the employment, provided it occurred in the course of the employment. And the fact that the injury was deliberately and intentionally inflicted does not remove the occurrence from the category of an accident as contemplated by the statute. *Id.* at 852.

In Appeal No. 91100, *supra*, we cited United Pacific Insurance Company v. Farley, 566 S.W.2d 677, 681 (Tex. Civ. App.-Waco 1978, no writ), a case in which two employees of a steel company, the plaintiff and his helper, Valverde, got into a dispute at the workplace over plaintiff's payment of wages owed the helper. Plaintiff had gone to the employer's yard to pick up Valverde and proceed to a project. Plaintiff found Valverde in a nearby bar where Valverde demanded payment from the plaintiff for some prior work. Valverde then followed plaintiff down the street and into the employer's yard. Plaintiff, with the helper behind him, was headed toward the office to attempt to straighten out the matter when the helper struck plaintiff over the head with a piece of steel tubing. The court observed that "[t]he mere fact that two employees of the same employer, or one of them and a third person not employed by the same employer, engage in a fight, is not controlling of the question of whether or not one of the employees who receives an injury while engaged in it is entitled to compensation." The court found the evidence sufficient to support the finding that the injury occurred in the course of the victim's employment. The court noted that plaintiff, at the time of his injury, was on the job and that his work day had already begun, that incidental to his duties he went out to look for his helper, and that after finding his helper the argument ensued which led to plaintiff's injury. The court noted that there was no evidence of a preexisting personal grudge between the two employees and that the argument arose during the time of the injured employee's regular duties "and was inspired by the employment relationship as it existed between them from the week just ending, and the wages that Valverde had earned in connection therewith." The court cited Texas Indemnity Ins. Co. v. Cheely, 232 S.W.2d 124 (Tex. Civ. App. -Amarillo 1950, writ ref'd) as holding "that proof that the injury occurred while the employee was engaged in or about the furtherance of his employer's affairs or business is not alone sufficient; but that plaintiff must also show that his injury was of such kind and character as had to do with and originated in the employer's work, trade, business, or
profession . . . " *Id.* at 681.

In United States Casualty Company v. Henry, 367 S.W.2d 405, 407 (Tex. Civ. App.-Waco 1963, writ ref'd n.r.e.), the court considered the compensability of injuries received by

an employee who attempted to break up a fight at the workplace between his father who was a former employer, and another employee. Plaintiff himself had had an altercation with that other employee a week earlier over the setting of forms. After first holding that an injury received while attempting to break up a fight is compensable, the court went on to state that "the jury had a right to believe that John Stoerkel hit plaintiff as an outgrowth of the dispute over the setting of forms, or that such dispute was a contributing factor. If a fight occurs over the manner in which work is to be done, it is compensable if injury results. (Citations omitted)." *And see* Liberty Mutual Insurance Co. v. Hopkins, 422 S.W.2d 203 (Tex. Civ. App.-Beaumont 1967, writ ref'd n.r.e.). In Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 289 (Tex. App.-Houston [14th Dist.] 1984, no writ), the injured employee of a slaughter house had been previously confronted by his foreman over the practice of giving sacks of meat scraps from the floor to friends. Sometime later, the foreman approached Campos, called him a liar, and raised his arm in a threatening gesture to scare Campos. Campos then grabbed the foreman, they fell to the floor, and Campos was injured. In holding the evidence sufficient to support the finding of injury in the course of employment, the court stated that "where an employee is injured in a personal difficulty arising over the manner in which his work is being done, although the difficulty itself is not a part of the work of the employee, such injury is compensable under the Act. (Citations omitted)."

In Nasser v. Security Insurance Company, 724 S.W.2d 17, 19 (Tex. 1987), a case involving an assault on a restaurant manager by the boyfriend of a customer, the court discussed the rationale for the "personal animosity" exception as follows:

> the purpose of the "personal animosity" exception is to exclude from coverage of the Act those injuries resulting from a dispute which has been transported into the place of employment from the injured employee's private or domestic life, at least where the animosity is not exacerbated by the employment. (Citation omitted). Whenever conditions attached to the place of employment or otherwise incident to the employment are factors in the catastrophic combination, the consequent injury arises out of the employment.

The evidence is sufficient to support the hearing officer's decision that claimant "was injured during the course and scope of his employment with [Employer] when he was struck by a co-employee, neither because of personal reasons unrelated to [claimant's] employment, nor because of [claimant's] willful (sic) attempt to injure himself or unlawfully injure another, and the carrier is liable for compensation." There was no evidence suggesting any explanation for PD's attack on claimant other than that offered by claimant (and partially corroborated by KP), to wit: that PD somehow came to believe that because he took claimant's helper away from the job with claimant on the day before the attack, claimant had either called or referred to PD as a "bitch;" and, that when claimant repeatedly denied using that term the next day in the break room, PD attacked him with a hammer. Whether the hearing officer believed claimant's version of the incident to the effect that claimant was hit while still seated or KP's version that claimant jumped up and asked PD if

he wanted to fight was of no moment. Under either scenario, the attack obviously related to PD's belief that claimant had called or referred to him as a "bitch" after PD took claimant's helper the previous day and was directed at claimant as an employee and because of the employment. Further, there was no evidence of a preexisting personal grudge or of either PD or claimant bringing a personal dispute to the workplace. The evidence is clear that PD attacked claimant as an employee, for reasons related to the employment, at the workplace in the break room provided for employees, and during the lunch hour on a workday when both were at work.

As for carrier's contention that claimant's injury occurred when he had not yet clocked back in for his afternoon work after his lunch break, carrier points us to no authority that this fact meant that claimant's injury was not compensable. We believe this issue was fully addressed and decided in Texas Workers' Compensation Commission Appeal No. 91019, decided October 3, 1991. In that case the injured employee was assaulted by one or two coworkers while clocked out for lunch and eating in a "roped off" section of the restaurant where he washed dishes. In affirming the injury as compensable, we cited the following jury instruction which was considered "not misleading" by the court in Texas Employers' Ins. Ass'n v. Prasek, 569 S.W.2d 545, 549 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.):

In this connection you are instructed that an act at the place or area of employment necessary to the health, comfort, and convenience of an employee while within working hours, during a lunch period, or while preparing to begin work or leave the premises, is not a departure from the course of employment.

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts

Appeals Judge